LABOR COMMISSION
OPEN MEETING MINUTES

October 10, 2007
1:00 p.m.
Heber M. Wells Building
160 East 300 South, Third Floor
Salt Lake City Utah 84114

PRESENT From the Labor Commission:

Sherrie Hayashi	Commissioner
Alan L. Hennebold	Deputy Commission/General Counsel
Joyce Sewell	Director, Industrial Accidents Division
Robyn Barkdull	Public Information Officer

OTHERS PRESENT:

Dawn Atkin	Applicant's Attorney
Mike Martinez w/guests	Applicant's Attorney
Mark Sanchez	Attorney
Lorraine Mayne	Milliman, Inc.
Steven Draper	Milliman, Inc.
Debra Bulkley	Deseret News
Jennifer Sanchez	Tribune
Leonard McGee	Robert J. Debry & Associates
Susan Danelly-Wilson	
Troy Martinez	
Gonzalo Cortez	
Marissa Hopkins	
Dr. Damon Green	Chiropracter
Tony Yapias	Community Activist
Mrs. Mesa	

Sherrie Hayashi, Commission, brought the meeting to order at 1:00 p.m.

1. R612-4 Premium Assessment Rates – Joyce Sewell

Joyce Sewell introduced **Lorraine Mayne and Steven Draper** from Milliman, Inc. She explained that each year the Commission contracts to have an actuarial study completed with recommendations for premium assessments for the Uninsured Employers' Fund (UEF) and the Employers' Reinsurance Fund (ERF). She turned the time over to Milliman for explanation.

Mr. Draper pointed out that the handouts were drafts only and that full actuarial reports for each fund, including a description of methods, assumptions, and results had been given to **Ms. Sewell** for the Commission. He explained that Milliman's purpose was twofold: projecting the liabilities of each fund at the end of the fiscal year; and recommending an assessment rate to insure that both funds could meet those liabilities**.**

Mr. Draper explained that the overall premium base had an increase of 14.9% from 2005 to 2006. The projected amount for calendar year 2006 was $611.4 million and the actual base revenue was $680.6 million. He said their best estimate of the projection for 2007 was an increase of 2.46% making the base $646.6 million.

The Employers' Reinsurance Fund (ERF) had revenue 11.3 % lower than projected due to higher premium tax revenue. Disbursements were 3.2% lower than projected due to continuing decrease in new claimants. Revenue exceeded the disbursements by $31 million in FY07. With this information, they are recommending that the 7.25% statutory maximum premium rate be maintained for 2008.

The Uninsured Employers' Fund (UEF) had higher revenue than projected primarily due to higher than expected investment returns and an increase in penalty collection from uninsured employers. The disbursements were lower than projected which left a positive $4.3 million cash flow for 2007. The current fund balance exceeds the minimum fund statutory requirement and the current projected liabilities. Based upon this information, Milliman, Inc. is recommending that the Commission maintain the .25% premium rate for 2008, but if penalties continue to stay high, future decreases may be warranted.

Commissioner Hayashi accepted the actuarial report, stating the Commission will adopt the rates as recommended.

2. R602-2-4. Attorney Fees – Alan Hennebold

Mr. Hennebold asked **Dawn Atkin** if she would review the status report and recommendation of the Attorney Fee Committee chaired by Tim Houpt and consisting of Dawn Atkin, Jinks Dabney, Scott Squire, Jan Moffat, Mark Dean, and Joyce Sewell. **Ms. Atkin** said Christy Larsen was also an official member of the committee, but had only attended two meetings.

Ms. Atkin summarized the recommendations of the committee. She said the Committee had revised the Appointment of Counsel form as they felt the current wording of the paragraph on the form had been demeaning, and unanimously agreed to very typical terminology.

Ms. Atkin then discussed reimbursable expenses, fees & costs. She said the Committee had added language which clarifies what reimbursable costs are and gives guidelines. There was no change, just a clarification. This had also been unanimously agreed upon.

Ms. Atkin then discussed adjustment of the attorneys' fees. She explained that difficult cases which involve high dollar amounts are becoming much more complicated and difficult to handle, and the attorneys' fee was not reflecting that. Additionally, smaller cases are becoming more difficult to handle and do not have equitable attorneys' fees. **Ms. Atkin** said this had been a very difficult issue for the Committee to discuss both for defense counsel and applicant's attorneys. At the last committee meeting, a compromise position had finally been reached following an 18 month work period.

The Committee was therefore unanimously proposing the following additional changes to R602-2-4:

A. For all legal services rendered through final Commission Decision, the fee shall be 25% of the weekly benefits generated for the first $25,000, plus 20% of the weekly benefits generated in excess of $25,000 but not exceeding $50,000, plus 10% of the weekly benefits generated in excess of $50,000 to a maximum of $15,250.

B. For legal services rendered in prosecuting or defending an appeal before the Utah Court of Appeals, they were proposing awarding 30% of the benefits in dispute plus the total amount of fees awarded as above in (A), not to exceed $22,000. She explained this was a change from the first proposal of $20,000, but was also a unanimous decision.

C. For legal services rendered in prosecuting or defending an appeal before the Utah Supreme Court, they were proposing awarding 35% of the benefits in dispute before the Supreme Court, plus the total amount of fees awarded in (A) and (B), not to exceed $27,000.

Ms. Atkin stated this change will provide a balance and allow competent attorneys to vigorously represent claimants in workers' compensation cases.

Commissioner Hayashi then opened the discussion to public comment. **Mr. Michael Martinez**, attorney, asked to address the agenda and stated he was speaking on behalf of those he had brought with him, most of whom had had experience with the results of this rule.

His presentation was given from written information which has been included in the minutes in its entirety. Names of witnesses, when identified to the Commission, were added for inclusion in the minutes.

MICHAEL N. MARTINEZ, ATTORNEY
PRESENTATION BEFORE THE UTAH LABOR COMMISSION AT
THE OPEN MEETING, OCTOBER 10, 2007, OPPOSING R602-2-4

Rule: R602-2-4 of the Workers Compensation Rules (hereafter "the rule") of the Utah Labor Commission regulates and fixes fees *only for attorneys representing injured workers who obtain death or disability compensation.* Recovery of *medical only benefits* for an injured worker is not compensated or compensated at an insignificant rate.

BACKGROUND: The Workers Compensation Act of the Utah Labor Code sates that an employee in Utah that is injured in a work related accident has no legal recourse against the employer, except as provided by statue and rules of the Utah Labor Commission. The theory is that employers have no liability for medical and compensatory damages suffered by injured workers in return for carrying insurance protecting the workers. This has been the law in Utah since 1917.

In 1919 a 15% contingent fee to be paid attorneys representing injured workers became a rule governing fees.

In 1981 the 15% contingent fee rule was modified to 20/15/10% to encourage attorneys to take injured worker cases where less compensation was involved.

In 1991 the rule as we know it today was instituted, that is, dollar caps on contingent fees were instituted through Commission rule. The theory being that greedy lawyers were taking the compensation out of the pockets of injured workers.

REASONS TO VOID RULE R602-2-4

Time proven reality is that the rule makes it: (1) economically prohibitive for any attorney to represent an injured worker. (2) Once this became evident insurers began to mistreat injured workers by refusing to pay medical benefits or offer reasonable settlements because it is to their profit to discourage claimants and not pay full value of injuries. (3) The rule encourages the

insurer to interfere with and supplant it's judgment for that of medical doctors because lawyers will not take medical only benefits cases. (4) The rule creates a one-sided relationship in which the injured employee is at the mercy of the insurer, especially if the worker is a minority or lacks formal education and can not navigate the complex system to obtain benefits. (5) The rule creates a suspect classification of identifiable groups that are treated disparately and discriminated against. (6) The rule creates a market monopoly by limiting competition through the setting of professional service fees. (7) The rule runs contrary to the Utah Constitution and case law which mandate protection of employee benefits as public policy.

REASONS THE RULE INJURES WORKERS SEEKING BENEFITS

(1) LAWYERS DO NOT TAKE WORKERS COMP CASES, IT DOES NOT PAY. It is economically prohibitive for an attorney to represent an injured worker.

The rule allows attorney fees only in cases where death or disability occurs. Yet, the majority of injured workers claims seek only payment of medical only services. By some estimates nearly 75% of all cases are only, or mainly, medical only cases. The rule under discussion provides that in "*medical cases only*" no fee may be awarded unless the Labor Commission's informal dispute resolution mechanisms were fully used. What occurs is, when medical benefits are recovered or appear beyond dispute, insurance counsel offers settlement before the dispute resolution mechanism can be utilized or completed. When a *medicals only* dispute qualifies for attorney fees, it is discretionary with the Labor Commission as to how much is earned, without regard to the amount recovered, length of time to recover benefits, or the amount of work performed.

When disability compensation is recovered the rule arbitrarily caps the fee at $12,250.00, (proposed $15,250.00), regardless of how much money is recovered for the injured worker, the years of time spent in pursuit of the recovery, and the effort put in. This artificial lid encourages delay and paper churning by insurer attorneys so the case is prohibitively expensive to continue. Then comes the offer, in serious impairment cases, of $90,000.00 to settle (which is the gross amount upon which the legal fee is determined). Once the $12,250.00/$15,250.00 is earned applicant counsel is working for free. It makes no difference to insurance counsel what the real value of the injury is because once the cap is obtained there is incentive for applicant counsel to settle or work for free. This places the applicant's attorney in an ethical dilemma.

The number of reported workplace injuries reported in 2006 was 64,007. Salt Lake/Davis/Utah County account for 67% of those injuries. The majority of attorneys in Utah reside in these counties. The Workers Compensation Bar of the Utah Trial Lawyers is comprised of only about 30 attorneys. The rule has reduced the pool of applicant counsel by mandating attorneys provide professional services for free, or little, in return for the time and effort spent vindicating injured worker interests against the unlimited resources of the insurer.

Witnesses:

Attorney #1: **(Mr. Mark Sanchez)** Few attorneys practice in this field; only one or two speak Spanish; payment of fees slow, not very profitable; turns away many, many cases because he can not handle caseload of mostly Spanish speaking injured workers;

Attorney #2: **(Mr. Leonard McGee – Robert J. DeBry & Associates)** A managing partner of major personal injury firm in Utah with experience as defense and plaintiffs counsel in injury cases. He hired bi-lingual paralegal to help injured workers and learned he could not pay overhead from cases as the artificial cap made it impossible to properly and ethically represent

clients; experienced injury attorneys will not take workers compensation cases because of artificial lid and mandate of free work in medical only cases.

(2) THE RULE ENCOURAGES INJURED WORKERS TO BE MISTREATED. Once insurers realized the rule made it impossible for injured workers to get counsel a concerted effort was instituted to increase profits by denying benefits in medical only claims.

Medical benefits are withheld, wage payments are slow to come, lack of communication is the norm w/non-English speaking injured workers, cases with merit are denied and delayed and applicant attorneys are papered into hearings that are needless. In the Spanish speaking community it is not unusual for an injured worker to be called a faker, an illegal alien, a freeloader. This is done by asking for social security numbers, alluding to citizenship status and depositions of personal facts unrelated to the injury. And this disrespect is shown not only by insurer personnel, but also by their usual providers.

Witnesses:

Community Activist: **(Anthony Yapias)** director of a non-profit which assists Spanish speaking clients. He sees and refers injured workers daily. Few can obtain legal counsel.

Injured worker #1: **(Mrs. Mesa)** She is a 49 year old who was diagnosed with chemical toxicity from her workplace. The doctor she was referred to by the Workers Compensation Fund called her a faker, told her to go to work, told her she had a 5% impairment and no evidence of injury. Her wages were cut off in June 2003. In July 2007 a medical panel found no substantiation for allegation she was *psychosomatic, nor for the 5% impairment rating.* The medical panel found she is permanently and totally disabled to work for the rest of her life. Her son dropped out of school to help support the family. She was earning, $14,000.00 a year when injured. Her family has supported her all these years.

Injured worker #2: She is a 34 year old diagnosed with chemical toxicity which, according the Commission medical panel, has permanently and totally disabled her for life. She was rated a 5% disability by the doctor WCF referred her to. The medical panel found no substantiation for the 5% impairment rating. But, the WCF used the bogus impairment rating to cut off treatment, stop wages, and make her wait over three years before she was vindicated.

Injured worker #3: He has a foot/ankle injury. After surgery WCF refused medical bills payment. An attorney represented him and obtained about $12,000.00 in medical benefits for him. His attorney was paid $750.00. Now he has no attorney and a doctor has limited his work time to 4 hours a day. He does not know what to do. He exhibited at the hearing the bag full of screws that were recently removed from his ankle.

(3) THE RULE ENCOURAGES INSURANCE ADJUSTERS, CASE MANAGERS, and ATTORNEYS TO SUBSTITUTE THEIR JUDGMENT FOR MEDICAL ADVICE.
The majority of injured worker cases are medical only cases because insurance company employees routinely cut off medical services regardless of the medical diagnosis or treatment recommended.

An injured worker can not navigate the forms and system necessary to obtain second opinions or switch doctors or even have a doctor see them because they are uninsured at the time the case manager cuts of benefits. The rule encourages denial of medical payments, because attorneys do not get paid for representing *medical only* applicants. Injured workers never know if they deserve more treatment, or lost wages and most importantly if they have an impairment.

Witness:

Local Chiropractor **(Dr. Damon Green)**: Physician is bilingual chiropractor whose practice is 69% Spanish speaking patients. He has experienced WCF adjusters/case mangers telling him to stop treatment after only a few treatments, regardless of his opinion or referral for other medical problems. Since WCF will not pay him he stops treatment. He surmises that most chiropractors experience the same.

(4) THE RULE SUBJECTS LESS EDUCATED, NON-ENGLISH SPEAKING WORKERS AT THE MERCY OF THE INSURANCE COMPANY. The insurance company places barriers so it will not have to service injured workers.

Few bilingual adjusters or case managers are hired. Questions regarding citizenship and legal status insinuate immigration reporting. It is not the insurer's right nor obligation to certify that an injured worker is authorized to work. Last October 2006 WCF attempted to have the Labor Commission Advisory Board acquiesce to a rule which would have denied benefits to non-citizens. This is because the foreign born work population is rapidly growing and is employed in the most dangerous jobs. WCF and other insurers are snail like in their service to this population.

The New Workforce: The fastest growing employee group in Utah is the Hispanic/Latino foreign born, mostly Mexican, worker. In Utah the highest number of reported injuries occurs in manufacturing and construction jobs. Foreign born Hispanics suffer the most injuries in these classifications also, according the Census Bureau, foreign born workers between the ages of 19-49 are 86% of the foreign born population in Utah. They are working age, which makes sense since they come to work. The ones that come to Utah are not well educated. 65% do not have a high school education. 8% have a high school diploma. Although Utahns have a 25% college graduate rate, Mexicans account for less than 5% college educated. The median income for a Mexican born worker in Utah is $15,000.00. There is no doubt the new workforce takes jobs that pay poorly, are prone to injury for lack of training and proper equipment, and have less ability to navigate a complex compensation system due to language and pre-dispositions. Foreign born workers are more likely to speak their native language and are respectful of those in authority.

Insurance companies do not want to have the new workforce represented, because they suffer serious injuries and require service above that required by English speaking workers. These workers are easily manipulated by insurance case managers. It is common to belittle injured workers through character attacks, as testified to by the witnesses.

(5) THE RULE CREATES AN IDENTIFIABLE CLASS OF PERSONS WHO ARE DISCRIMINATED AGAINST. By placing arbitrary caps on and/or denying professional fees the Labor Commission creates suspect classifications of identifiable groups which are discriminated against.

In Nathan Merrill vs. Labor Commission, 163 P3d 741 (2007), Utah Court of Appeals, an injured worker challenged the Workers Compensation Act by alleging that the Act violated the Equal Protection Clause of the U.S. and Utah Constitutions. The court stated that the injured worker had to prove that the statute challenged violates or infringes upon a "*fundamental right or creates suspect classifications*". Conversely, the state has to prove that the classification made serves a "*legitimate purpose*".

The existing rule creates a class of injured workers who have medical benefits denied. The rule then effectively bars ability to contest denial of medical benefits. This group is distinct from

workers seeking disability or death benefits. In these cases a lawyer may be found. The rule also creates a class of undereducated, foreign born/non-English speaking workers who can not exercise their right to benefits without representation. This class is distinguished by it's national origin.

The rule also creates two classes of attorneys who practices before the Labor Commission. The rule applies only to "*attorneys representing applicants*". But, the statute states that "*In all cases coming before the commission in which attorneys have been employed, the commission is vested with full power to regulate and fix the fees of the attorneys."* Insurance counsel is excluded from any fee restrictions and therefore insurance companies have an incentive to drag out perm total disability cases, and cases where an injured worker manages to find an attorney. The rule has succeeded in deterring attorneys from practicing workers compensation law.

According to Merrill the Labor Commission must articulate what legitimate purpose is served by fee caps. What is the legitimate purpose in limiting the pool of applicant attorneys through arbitrary fee caps? What is the legitimate purpose in denying the non-English speaking injured worker the ability to contest insurer tactics? What is the legitimate purpose for capping professional fees of only applicant attorneys and allowing the multi billion dollar insurer to spend untold millions to defend benefits denials? The benefit of this rule is so obvious, limit the ability of applicants to contest employer decisions by depleting the pool of applicant attorneys. Conversely the rule gives the insurer free reign to spend all it can to retain it's stranglehold on medical care, for self serving profit.

(6) THE RULE IS ANTI-COMPETITIVE. Pursuant to the Utah Anti-Trust laws, UCA 76-10-914, the rule is an attempt to monopolize through the control of professional fees which substantially lessens competition.

In fact, this rule has already created a monopoly. The WCF insures over 65% of the market for workers compensation insurance. If you take out self insured companies it insures 80% of the market. It is nearly a 2 billion dollar *private* company. In 2006 it returned over 40 million dollars to its policyholders. Imagine what its profit was if that money was returned.

The law states that it is unlawful to *monopolize, or attempt to monopolize, any part of trade or commerce.* An attempt to monopolize means action *"destroying competition or controlling prices"*. Statutorily the control of *professional services* is a manner of destroying competition or controlling prices, When trade competitors control *professional services* they lessen competition for the dollar paid by employers as premiums.

Mr. Martinez went on to say that the Task Force, considering the present rule, refused to consider all alternatives and would only discuss a continuation of the present rule which limits professional services of the applicant bar through the control of prices. This Task Force was a means of destroying commerce through the control of professional service fees. Implementation of this rule is an unlawful combination in furtherance of a monopoly.

(7) THE RULE AS APPLIED IS CONTARY TO THE WELFARE OF THE LABOR FORCE OF UTAH. Article XVI, Section 1 of the Utah Constitution states that "*The rights of labor shall have just protection through laws calculated to promote the industrial welfare of the State."*

The constitutional protection of labor was reaffirmed in Touchard vs. La-z-boy, Inc. 148 P3d 945, Ut. Sup. Ct, 2006. In this case the Utah Supreme Court issued an opinion which held that "*workers compensation right furthers a clear public policy*", and is of *"overreaching importance to the public"* because its purpose is to *"provide economic protection for employees who sustain*

injuries…therefore alleviating hardship upon workers and their families." The public policy duty of the employer to care for injured employees is carried out by an insurance company. The insurer has no duty to implement the public policy. On the contrary, it's corporate duty is to make money.

In the La-z-boy case the Supreme Court stated, *constructive* termination occurs when a person is forced to resign due to "*intolerable*" working conditions. The rule gives incentive to make things "intolerable" for injured worker applicants. Claim denials, denials of medical payments, late wage payments and accusations of faking or fraud. These intolerable actions easily push unrepresented applicants out of the system and are *constructive denials of benefits*. The benefits which the court said are of "overreaching importance to the public".

The Labor Commission has a rule which violates the clear and substantial public policy of the state of Utah, by constructively denying injured workers the ability to obtain benefits through the capricious limiting of attorney fees. This is constructive termination of benefits and is unconstitutional.

ALTERNATIVE SOLUTIONS

There are lawful means to protect the pocket books of the injured worker. But the Task Force appointed to investigate these alternatives did not do so because insurance attorneys, unencumbered by the rule, had a corporate loyalty, not public policy viewpoint. There is no barrier to striking the rule and let the market forces dictate the fees. Or, the Commission can cap the market forces at the 312 week total. The Commission can cap the fees at a percentage which is reasonable and does not inhibit representation, i.e. the Federal Tort Claims Act limits payments to 20% of gross recovery for pre-litigation settlements and 25% of the gross recovery for litigated cases. You can regulate fees of all lawyers that practice before the Commission. For example, the insurer can limit attorney salaries or contracts to $90,000.00, with benefits. The same limit as the applicant bar has. So many alternatives, so little thought given to any of them.

CONCLUSION

There is no equity between an applicant, even with counsel, and the WCF's unlimited resources. Applicant attorneys earn no money during the dispute. WCF attorneys are paid handsomely during the dispute. Applicant attorneys are few. WCF can hire as many attorneys as it wants. Applicant attorneys do not take medical only cases. The majority of applicants seek medical payments which have been denied or cut off prematurely. Applicant attorneys are governed by a rule that does not affect the insurance bar which also practices before the Labor Commission. Insurance companies set professional fees for competitors who seek to use the employer insurance premium as payment for injured worker benefits rather than profit.

The rule does not further the public policy of protecting injured workers and their families from hardship. To the contrary, as was testified to by witnesses, families are the ones burdened by the restrictions on the Applicant Bar. Without challenge to its decisions the WCF has become a monopolistic dictator which controls workers compensation policies, through control of competition. The Labor Commission must strike the rule that obstructs equity for the injured worker and implement public policy.

After the conclusion of **Mr. Martinez'** presentation, **Ms. Atkin** wanted to comment as a private attorney, not as a member of the Committee. She felt strongly that removal of the caps would be a big detriment to the injured worker. As workers' compensation settlements are generally not given in a lump sum, injured workers could end up making monthly payments to attorneys from

their monthly benefits. She said this would go on for the life of the benefit and she viewed that as unethical. She added that although the Rule does not address nor solve all problems, it provides a step in the right direction.

Commissioner Hayashi pointed out that attorneys' fees are paid directly by claimants out of their benefit award. The removal of all caps would mean much larger fees for injured workers to pay. She felt the rule did provide some recourse, but agreed to take **Mr. Martinez'** remarks into consideration and make a determination within 30 days.

Commissioner Hayashi adjourned the meeting at 1:45.